APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8588

D.C. Docket No. 1:93-CV-251-MHS

MARY OWENS, CLARENCE E. OWENS,
Plaintiffs-Appellants,

versus

TERRY LYNN HEWELL, individually and in his capacity as a Police Officer for the City of Loganville, Georgia; BRIAN GEORGE, individually as a Trooper for the Georgia State Patrol; CITY OF LOGANVILLE,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 7, 1994)

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

"Costs taxed against plaintiffs-appellants."

Judgment Entered: January 7, 1994
For the Court: Miguel J. Coretz, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/11/94

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:93-cv-251-MHS

MARY OWENS and CLARENCE OWENS,
Plaintiffs,

v.

TERRY LYNN HEWELL, *et al.*,
Defendants.

ORDER

This action is before the Court on defendants' motions to dismiss. For the reasons stated below, the Court grants the motions.

In October 1991, a police car driven by defendant Officer Terry Lynn Hewell struck plaintiff Mary Owens's car when plaintiff's car entered an intersection. While plaintiff was being treated in a hospital for her injuries, defendant Hewell and defendant Brian George, the Georgia State Patrol officer who investigated the collision, gave plaintiff a traffic citation charging her with violating a state law requiring motorists to yield to an approaching emergency vehicle. At county traffic court, plaintiff's traffic citation was dismissed since defendant Hewell did not have on his siren before the accident occurred.

Plaintiff brings this action under 42 U.S.C. § 1983, claiming that defendants subjected her to an illegal arrest in violation of the Fourth Amendment and maliciously prosecuted her in violation of the Fifth Amendment Plaintiff has supplemental state law claims for false ar-

rest, malicious prosecution, intentional infliction of emotional distress, negligence, and loss of consortium; plaintiff also seeks punitive damages. Defendants City of Loganville and Hewell move to dismiss on the ground that plaintiff has failed to state a claim upon which relief can be granted, and defendant George moves to dismiss on the ground of qualified immunity.

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Court first examines defendants City of Loganville and Terry Lynn Hewell's motio to dismiss for failure to state a claim upon which relief can be granted. Under Federal Rule of Civil Procedure 12(b)(6), a district court can dismiss an action for failure to state a claim upon which relief can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1439 (11th Cir. 1985) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Defendants City of Loganville and Terry Lynn Hewell first argue that plaintiff has failed to state a claim for illegal arrest under the Fourth Amendment. Specifically, defendants argue that they cannot be liable to plaintiff for an illegal arrest under the Fourth Amendment because plaintiff was never arrested, even when defendants gave her a traffic citation in the hospital. In response, plaintiff argues that she was subject to arrest and imprisonment of up to one year for her alleged violation of O.C.G.A. § 40-6-74(a) (1991), and that if she had not appeared at traffic court, she would have been arrested.

Generally, a person is seized within the meaning of the Fourth Amendment only if, considering the surrounding circumstances of the incident, a reasonable person would believe that she was not free to leave. *United States v.*

Mendenhall, 446 U.S. 544, 554 (1980); *cf. Florida v. Roper*, 460 U.S. 491, 498 (1983). Construing the pleadings in favor of plaintiff, the Court concludes that plaintiff's being subject to arrest or subject to imprisonment is not an arrest. Nor is defendants' giving plaintiff a traffic citation while she was in the hospital an arrest. *See United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1985); *United States v. Lunt*, 732 F. Supp. 599, 604 (W.D. Pa. 1990). Further, no evidence shows that plaintiff was in custody at the time she appeared in county traffic court. On these facts, plaintiff has failed to make out a claim for illegal arrest under the Fourth Amendment.

Defendants City of Loganville and Hewell next argue that plaintiff has failed to state a claim for malicious prosecution under the Fifth Amendment. Defendants argue that while a claim for malicious prosecution can rise to a constitutional deprivation, plaintiff has not alleged that defendants used governmental power in an egregious or shocking way and therefore violated plaintiff's constitutional rights. Plaintiff argues that she has made out a claim for malicious prosecution under Georgia law.

Generally, a malicious prosecution claim can support a claim for relief under § 1983. *NAACP v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990). The majority of circuits, however, hold that § 1983 provides a remedy only if the misuse of the legal proceedings is so egregious that it deprives the plaintiff of a constitutional right. *Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990). Thns, a plaintiff must not only prove the elments of malicious prosecution under state law,[1] but also must

[1] Under Georgia law, a plaintiff bringing a malicious prosecution claim must prove the following elements: (1) prosecution for a criminal offense; (2) the prosecution was instigated under a valid warrant, accusation, or summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) lack of probable cause; and (6) damage to the plaintiff. *Medoc Corp. v. Keel*, 166 Ga. App. 615, 615-16 (1983).

show egregious conduct by the governmental official that rises to the level of a constitutional deprivation. *Id.*

Construing the pleadings in favor of plaintiff, the Court concludes that plaintiff has failed to state a claim for malicious prosecution that amounts to a violation of § 1983. Plaintiff has not shown an egregious misuse of legal proceedings that deprived her of a constitutional right. Defendants had a reasonable basis for charging plaintiff with violating section 40-6-74(a), and no evidence suggests that defendants had any discriminatory, retaliatory, or unconstitutional motive for giving plaintiff the traffic citation. Plaintiff then has also failed to state a claim for malicious prosecution under § 1983.

II. MOTION TO DISMISS ON QUALIFIED IMMUNITY DEFENSE

The Court next examines defendant Brian George's motion to dismiss on the ground that he is entitled to the defense of qualified immunity.[2] Plaintiff argues that defendant George is not entitled to the defense on these facts. Under the "objective-reasonableness" test, a court must evaluate a government official's action against clearly established federal statutory or constitutional rights of which a reasonable person would have knowledge. *Courson v. McMillian,* 939 F.2d 1479, 1487 (11th Cir. 1991). District courts should not focus on the official's subjective good faith in § 1983 actions but rather on whether a reasonable official under the circumstances would have known that his conduct violated clearly established law. *Id.* Qualified immunity protection is usually provided to "all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

This Circuit has adopted a two-part analysis for applying the objective-reasonableness test to a qualified immu-

[2] Plaintiff also brought her claims for illegal arrest and malicious prosecution against defendant George.

nity defense. *Id.* First, the defendant public official must show that he acted within the scope of his discretionary authority when the allegedly wrongful act occurred. *Id.* Second, after the defendant has shown that he acted within the scope of his discretionary authority, the burden shifts to the plaintiff to show that the defendant lacked good faith, that is, that the defendant's acts violated clearly established statutory or constitutional law. *Id.* The second part of the analysis requires the Court to determine whether the applicable law was clearly established when the government action in question occurred and then whether the government official's conduct was in violation of clearly estabished law. *Id.* at 1487-88.

On these facts, the Court concludes that defendant George is entitled to the defense of qualified immunity on plaintiff's Fourth Amendment claim of illegal arrest and Fifth Amendment claim of malicious prosecution. Defendant George acted within the scope of his discretionary authority when he gave plaintiff her traffic citation. Further, a reasonable officer under these circumstances would have believed that giving plaintiff the traffic citation in this instance did not amount to an illegal arrest or malicious prosecution and therefore comported with the Fourth and Fifth Amendments. *Anderson v. Creighton*, 483 U.S. 635, 647 (1984). As concluded above, there is no factual basis for an illegal arrest on malicious prosecution in this action.

III. PLAINTIFF'S SUPPLEMENTAL STATE LAW CLAIMS

Defendants urge the Court to decline to exercise supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367(c). While the exercise of supplemental jurisdiction is discretionary, *see Hubbard v. Stewart*, 651 F. Supp. 294 (M.D. Ga. 1987), if a district court dismisses a plaintiff's federal claims before trial, then, under *United Mine Workers v. Gibbs*, 383

U.S. 715, 726 (1966), the court must dismiss the plaintiff's supplemental state law claims. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984); *accord Homes by Michelle, Inc. v. Federal Savings Bank*, 733 F. Supp. 1495, 1498 (N.D. Ga. 1990). Therefore, the Court dismisses plaintiff's state law claims.

IV. CONCLUSION

In summary, the Court GRANTS defendants City of Loganville and Terry Lynn Hewell's motion to dismiss [#4-1], GRANTS defendant Brian George's motion to dismiss [#5-1], and DISMISSES plaintiff's remaining state law claims.

IT IS SO ORDERED, this 27 day of April, 1993.

ENTERED ON DOCKET

Apr. 29, 1993

By L.D.T., Clerk
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:93-cv-251-MHS

MARY OWENS, *et al.*,
Plaintiffs,

vs.

TERRY LYNN HEWELL, *et al.*,
Defendants.

JUDGMENT

This action having come before the court, Honorable Marvin H. Shoob, United States District Judge, for consideration of the defendants' motions to dismiss, and the court having granted said motions, it is

Ordered and Adjudged that the plaintiff take nothing, that the defendants recover their costs of this action, and the action be, and the same hereby is dismissed.

Dated at Atlanta, Georgia, this 29th day of April, 1993.

LUTHER D. THOMAS
Clerk

By: /s/ Sherry Gibbons
SHERRY GIBBONS
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
April 29, 1993

LUTHER D. THOMAS
Clerk

By: /s/ Sherry Gibbons
SHERRY GIBBONS
Deputy Clerk

APPENDIX D

[Filed Feb. 25, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8588

MARY OWENS, CLARENCE E. OWENS,
Plaintiffs-Appellants,

versus

TERRY LYNN HEWELL, individually and in his capacity as a Police Officer for the City of Loganville, Georgia, BRIAN GEORGE, individually as a Trooper for the Georgia State Patrol, CITY OF LOGANVILLE,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
Chief Judge